U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GLORIA J. KING-MONROE and DEPARTMENT OF DEFENSE, DEFENSE LOGISTICS, New Cumberland, PA

Docket No. 01-1854; Submitted on the Record;
Issued February 21, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON, MICHAEL E. GROOM

The issues are: (1) whether appellant has met her burden of proof in establishing that she sustained a recurrence of disability on June 25, 1999 due to her accepted employment injury; and (2) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits on the grounds that she refused an offer of suitable work.

Appellant, a 44-year-old material handler, filed a notice of traumatic injury alleging that she injured her back and left leg in the performance of duty on December 2, 1996. The Office accepted appellant's claim for a lumbar sprain and strain on February 11, 1997. Appellant underwent surgery for lumbar discectomy on January 27, 1998. She returned to light-duty work and alleged on June 25, 1999 that she sustained a recurrence of disability causally related to her accepted back condition.

In a letter dated February 18, 2000, the Office found that a position offered by the employing establishment was suitable to her work restriction and allowed appellant 30 days to accept the position or offer her reasons for refusal. Appellant declined the position. By decision dated June 21, 2000, the Office terminated appellant's compensation benefits finding that she refused an offer of suitable work. The Office also denied appellant's claim for a recurrence of disability by decision dated June 26, 1999.

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits.

It is well settled that, once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[1] As the Office in this case terminated appellant's compensation under 5 U.S.C. § 8106(c), the Office must establish that appellant refused an offer of suitable work. Section 8106(c) of the Federal Employees' Compensation

[1] *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

Act[2] provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee is not entitled to compensation. Section 10.517 of the applicable regulations[3] provides that an employee who refuses or neglects to work after suitable work has been offered or secure for the employee, has the burden of showing that such refusal or failure to work was reasonable or justified, and shall be provided with the opportunity to make such showing before a determination is made with respect to termination of entitlement to compensation. To justify termination of compensation, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[4]

Appellant's attending physicians, Drs. Steven E. Morgenstein and Robert L. Green, osteopaths, reviewed the position description for a packer. On May 3, 1999 Dr. Green stated that appellant could perform the duties of the offered position. On May 25, 1999 Dr. Morgenstein stated that appellant could handle the job with a lumbar support chair. On June 1, 1999 Dr. Stuart A. Hartman, an osteopath, stated that appellant could lift up to 10 pounds and sit in an ergonomic chair. The employing establishment underwent an on-site ergonomic assessment on August 10, 1999 and determined that the job site was appropriate for appellant.

The Office medical adviser reviewed the offered position on October 25, 1999 and February 18, 2000 and stated it was within appellant's work restrictions.

The Office informed appellant on February 18, 2000 that the employing establishment had provided her with a suitable work position. The Office allowed appellant 30 days from the date of the letter to either accept the position or offer her reasons for refusal. On April 7, 2000 the Office informed appellant that she had not provided any reasons for her refusal of suitable work. The Office allowed appellant an additional 15 days to accept the position. By decision dated June 21, 2000, the Office terminated appellant's compensation benefits finding that the position of packer was suitable work.

In a report dated February 16, 2000 received by the Office on May 5, 2000, Dr. Robert Little, a Board-certified family practitioner, stated that appellant had chronic low back pain and that she could not do any work which required twisting or bending. Dr. Little stated that appellant could not stand for long periods of time. He noted that appellant stated that she had previously performed the suitable work position which required twisting and reaching. Dr. Little opined that appellant could not perform such a job.

The employing establishment responded on June 19, 2000 and stated that the offered position did not require bending or twisting.

The Board finds that the medical evidence establishes that the offered position is suitable. There is no medical evidence in the record to support appellant's contentions that the offered

[2] 5 U.S.C. § 8106(c) (2).

[3] 20 C.F.R. § 10.517(a).

[4] *Arthur C. Reck*, 47 ECAB 339, 341-42 (1995).

position is beyond her restrictions.[5] Therefore, the Board finds that appellant refused an offer of suitable work and the Office properly terminated her compensation benefits.

The Board further finds that appellant failed to establish a recurrence of disability beginning June 25, 1999.

Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between her alleged recurrence of disability commencing June 25, 1999 and her 1996 employment injury.[6] This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.[7]

In this case, appellant filed a claim for recurrence of disability on February 2, 2000 alleging on June 25, 1999 she sustained a recurrence of disability due to her accepted employment injury. She stated that she had back spasms with movement. On the notice of recurrence of disability, appellant alleged that she sustained a recurrence of her physical disability on June 25, 1999. The hearing representative found that appellant had not established that she sustained a recurrence of total disability beginning June 25, 1999 due to her accepted back injury and that work meeting her physical restrictions was available to appellant.

At the oral hearing, on January 24, 2001, appellant testified that she worked in the packer position from May to June 1999. She stated that the duties of this position aggravated her back. Appellant's attending physician, Dr. Hartman, an osteopath, completed a report on June 1, 1999 and found that appellant's chronic low back pain was stable and that she was considering arthroscopic surgery on her leg. He recommended an ergonomic chair.

Appellant submitted a sick leave request to the employing establishment on June 25, 1999 on the grounds that she was undergoing knee surgery and required sick leave from June 28 to July 12, 1999. The employing establishment denied appellant's request for sick leave. In support of her claim for recurrence of disability, appellant submitted an October 18, 1999 report from Dr. Little, a Board-certified family practitioner, noting that he examined appellant on June 21, 1999 due to severe muscle spasm in the right upper back, job stress and depression. Dr. Little examined appellant on June 26, 1999 and advised her not to work as her job required lifting, reaching and twisting of her back. He diagnosed chronic low back pain due to osteoarthritis and degenerative disc disease, chronic myofascial pain syndrome, upper and lower back, severe depression and right knee meniscus tear with chronic knee pain. In a report dated July 8, 1999, Dr. Little stated that appellant experienced chronic back and knee pain and that she could not perform her usual conveyor belt duties.

[5] The Board notes that appellant returned to work in the offered position in June 1999 and then filed a notice of recurrence of disability. However, the evidence establishes that after appellant's work stoppage, the employing establishment replaced appellant's chair which was described as "poor." The ergonomic specialist found that the new chair and workstation were appropriate.

[6] *Dominic M. DeScala*, 37 ECAB 369, 372 (1986); *Bobby Melton*, 33 ECAB 1305, 1308-09 (1982).

[7] *See Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

A recurrence of disability is defined as a spontaneous material change in the employment-related condition without an intervening injury.[8] Appellant has not submitted any medical evidence establishing that she sustained a recurrence of disability on or after June 25, 1999. Dr. Little's reports do not support a material change in appellant's employment-related condition. He found that appellant was not capable of performing the duties of a packer both before and after June 25, 1999. As noted previously, the Board found that the weight of the medical evidence established that this position was within appellant's capabilities. As Dr. Little did not note any change in appellant's condition following her the date of her alleged recurrence of disability, on June 25, 1999, his reports are insufficient to meet her burden of proof.

Appellant submitted work release notes from a physician's assistant dated July 12 and July 26 1999. As a physician's assistant is not a physician under the definition provided in the Act,[9] these notes due not medical evidence and are insufficient to meet appellant's burden of proof.[10]

Appellant has failed to provide the necessary medical opinion evidence establishing a material change in her accepted employment-related condition such that she was totally disabled from the position of packer.

Appellant also alleged that she developed an emotional condition as a result of her accepted employment injuries and other factors of employment. Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or illness has some connection with the employment but nevertheless does not come within the concept of workers' compensation. When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability is compensable. Disability is not compensable, however, when it results from factors such as an employee's fear of a reduction-in-force or frustration from not being permitted to work in a particular environment to hold a particular position.[11]

The hearing representative found that appellant's diagnosis of depression was based on complaints of harassment by her managers, coworkers and the Office which were not supported by any corroborating evidence and denied her claim for recurrence of disability due to an emotional condition.

Appellant stated that the employing establishment used her annual and compensatory leave without her request and that the employing establishment denied her request for sick leave due to surgery. As a general rule, an employee's emotional reaction to an administrative or personnel matter is not covered under the Act. But error or abuse by the employing establishment in what would otherwise be an administrative or personnel matter, or evidence that

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(B) (1) (January 1995).

[9] 5 U.S.C. §§ 8101-8193, § 8101(2).

[10] *Arnold A. Alley*, 44 ECAB 912, 921 (1993).

[11] *Lillian Cutler*, 28 ECAB 125, 129-31 (1976).

the employing establishment acted unreasonably in the administration of a personnel matter, may afford coverage. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[12] The Board considers leave denials[13] to be administrative or personnel matters. Appellant has submitted no evidence in support of her allegation of error or abuse in the use or denial of leave. Therefore appellant has not substantiated this compensable factor of employment.

Appellant stated that she was assigned to a detail, but not provided with the appropriate paperwork to demonstrated the experience she gained and that she was recalled from the detail and assigned to another shift and to the floor area to work. Mr. O'Brien stated that management was not required to track details of less than 30 days. Appellant has submitted no evidence in support of her allegation of error or abuse on the part of the employing establishment in failing to provide paperwork for the detail on which appellant served. As Mr. O'Brien denied that the employing establishment was required to submit paperwork on this detail and as appellant has not submitted any evidence that the employing establishment was required to do so, appellant has not established that the employing establishment committed error or abuse in this administrative or personnel matter.

Appellant alleged that on June 25, 1999 the employing establishment cancelled her surgery. In a letter dated June 30, 1999, Lora A. Crowder, the injury compensation administrator, noted that she had called appellant's surgeon's office regarding appellant's surgery and that as a result of her call, the physician had cancelled appellant's surgery. Appellant became upset and visited the employing establishment health clinic and received referral to her physician for further treatment due to elevated blood pressure. Although she has established that the employing establishment contacted her physician regarding her request for leave to undergo surgery, appellant has not established that this constituted error or abuse in an administrative or personnel matter. Ms. Crowder indicated that she believed that appellant's surgery was due to an employment-related condition and that, when she expressed this to appellant's physician, his office chose to cancel appellant's surgery as it had not requested and obtained approval from the Office. Appellant has not submitted any evidence that it was inappropriate for the employing establishment to contact her physician regarding her request for leave regarding this surgery, nor has she established that the employing establishment erred in providing information regarding appellant's workers' compensation claims.[14]

Appellant alleged that the employing establishment requested medical releases to determine her entire medical history and that her medical condition was revealed to a coworker. On October 29 and November 17, 1998 Mr. O'Brien requested that appellant provide clarification of medical information as well as a signed consent releasing medical information. He stated that he was not aware of any discussion of appellant's medical condition without her

[12] *Martha L. Watson,* 46 ECAB 407 (1995).

[13] *Elizabeth Pinero,* 46 ECAB 123, 130 (1994).

[14] The Board notes that appellant's right knee condition of meniscal tear has not been accepted by the Office as employment related under this claim number. There is no evidence in the record addressing whether appellant had filed a separate claim with the Office for this condition or whether she attributed this condition to something other than her employment.

consent. Appellant has not submitted any evidence establishing that it was inappropriate for the employing establishment to request clarification of her medical condition given the need to establish appellant's work restrictions. Furthermore, Mr. O'Brien denied that appellant's medical condition was discussed with a coworker and appellant has not submitted any independent evidence, other than her allegations, to establish error or abuse in the personnel matter of determining her medical issues as related to her employment.

In a affidavit dated March 25, 1999, appellant's supervisor, Mr. O'Brien, stated that on or about October 14, 1998 appellant, stated that she could not perform duties in her assigned area, that he asked if appellant could answer the telephone in the office, that she reminded him that she was not to sit in the office as it was too cold. He then asked appellant to sit outside his office and answer the telephone for the remainder of her shift. Appellant did so and informed him the following day that this arrangement was not suitable. Mr. O'Brien also asked appellant to sit in a break room. Appellant has not submitted any evidence that her change in work location was error or abuse on the part of the employing establishment. Mr. O'Brien indicated that he made these changes in order to comply with appellant's various work restrictions. As there is no evidence, that the employing establishment acted unreasonably in changing appellant's work location, she has not established error or abuse in this personnel matter.

Appellant alleged that she did not receive reimbursement for her safety shoes. Mr. O'Brien stated that appellant's shoe request was processed in March 1999. She alleged that she did not receive her shift differential pay for six weeks. In a memorandum dated June 25, 1999, Mr. O'Brien noted that appellant was paid second shift premium from May 10 to June 25, 1999 and that she should have received third shift differential pay. In a statement dated October 20, 1999, he noted that there were some administrative errors made and that appellant brought it to management's attention and eventually received her back pay owed. The Board notes that appellant has established error or abuse in an administrative matter, the failure of the employing establishment to pay appellant at the correct rate from May 10 to June 25, 1999.

Appellant alleged that she was harassed or experienced retaliation as a result of the above-mentioned actions of the employing establishment as well other events. For harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[15]

Appellant alleged that the employing establishment cancelled an appointment with an ergonomics specialist as she was required to make this appointment through her supervisor. She stated that her supervisor refused to speak to her for two days. Appellant alleged that, on June 23, 1999, the employing establishment informed her of a disciplinary meeting on that date regarding insubordination and absence without leave (AWOL) and that she was not allowed to discuss other issues during this meeting. Her supervisor suggested another meeting the

[15] *Alice M. Washington*, 46 ECAB 382 (1994).

following day to discuss appellant's concerns, but was not at work on that date. Appellant stated that her supervisor gave permission for her absence and later became angry and charged that she was AWOL. She alleged that on June 22, 1999 she requested a union steward during a meeting with her supervisor and another manager. Appellant's supervisor had provided a steward, but appellant requested someone else. She alleged that her supervisor became upset and yelled at her as well as canceling the meeting. The following day, appellant's supervisor allowed her five minutes to obtain a steward. She stated that he held up his hand to indicate the amount of time allowed frightening appellant. Appellant's supervisor denied her requests to speak to her union steward later that shift. Her supervisor refused to discuss the situation with her "even for one minute." Appellant alleged that on June 18, 1999 the worker's compensation manager informed her that she was tired of spending time on appellant's case in a loud and angry tone. She also contacted appellant's physicians and requested that appellant be removed from light duty. Appellant stated that she was threatened with disability retirement. She stated that the employing establishment did not provide her with an appropriate chair in a timely fashion and misrepresented that her chair had been changed to her physician.

Appellant has not submitted any evidence establishing that these events which she felt constituted harassment occurred as alleged. As appellant has not established a factual basis for these events, she has failed to established harassment based on the above-mentioned incidents. Without probative and reliable evidence that the events occurred as alleged, appellant has failed to substantiate that these events are compensable factors of employment.

Appellant stated that her coworkers teased her and made jokes about her as she was forced to sit outside her supervisor's office or in the break room with no work. In an email dated March 13, 1999, Angela Clark noted that appellant had complained that coworkers were asking why she sat in the assigned location and appellant had alleged that a supervisor, Thomas Semone, informed appellant that he did not know why she was sent to cause problems for him. On March 16, 1999 Mr. Semone stated that he had informed appellant that he did not believe that she should be in his section because of her difficulties in using stairs.

Although appellant has established through Mr. O'Brien's statement that she was required to sit outside his office or in the break room, she has not established that she had no work nor that her coworkers were making jokes about her. She also failed to substantiate her allegation that Mr. Semone asked why she was sent to cause problems for him. Although Mr. Semone indicated that he did not believe that his section was appropriate for her, he indicated that this was due to a concern for her health, rather than due to "problems for him." Appellant has not established this allegation of harassment.

Appellant stated that one coworker suggested that tying a rope around appellant's back, hooking it to a car and making her run to the front door. She stated that she felt afraid for her life as just a few weeks earlier someone had died from such an act. In an email dated December 1, 1998, Ken Slaseman noted that Thomas Edmonson also had a back injury and that he suggested that he and appellant would benefit from being hooked to a car bumper and pulled to fix their backs. Mr. O'Brien stated one of appellant's coworker's, Mr. Edmonson, made inappropriate remarks concerning appellant's disability. Mr. Edmonson apologized immediately thereafter in a meeting held with appellant. Appellant has substantiated that Mr. Edmonson made inappropriate remarks that she perceived as harassment.

Appellant alleged that the packing job violated her physician's restrictions and that she was forced to perform this position which contributed to her emotional condition. As the Board has previously found that this position constituted suitable work, appellant has not established the compensable factor that she was forced to work beyond her restrictions.

As appellant has established compensable factors of employment, that the employing establishment erred by paying her at an incorrect rate and that a coworker made a harassing remark, the Board will consider the medical evidence to determine if appellant has met her burden of proof in establishing an emotional condition due to her federal employment.

In support of her claim for an emotional condition, appellant submitted a report dated October 18, 1999 from Dr. Robert G. Little, a Board-certified family practitioner, diagnosing depression. Dr. Little stated that appellant's condition was "partially related to interpersonal stress at work." As he did not attribute appellant's diagnosed condition of depression to the specific compensable factors of employment found by the Board, his report is not based on a proper factual background and is insufficient to meet appellant's burden of proof in establishing an emotional condition due to her federal employment.

Appellant also submitted a report dated October 28, 1999 from Dr. Robert J. Beachy, a clinical psychologist, who diagnosed a major depressive episode. Dr. Beachy stated that appellant's diagnosed condition was the direct result of harassment by her supervisor, coworkers and the workers' compensation representative at the employing establishment. He further attributed appellant's depressive episode to verbal attacks and sanctions by appellant's supervisor and noted that appellant did not feel that she could perform the duties of her position and feared that this inability would result in further harassment.

Appellant has not established harassment by her supervisor or the workers' compensation representative at the employing establishment. Furthermore, Dr. Beachy did not specifically mention the statement by Mr. Edmonson which the Board has found constituted harassment. As he did not attributed appellant's emotional condition of depression, to the compensable factors of employment accepted by the Board, the failure of the employing establishment to pay appellant at the correct rate and the statement by Mr. Edmonson, his report is not based on a proper factual background and is insufficient to meet appellant's burden of proof.

As appellant has failed to submit medical evidence diagnosing her emotional condition and discussing the causal relationship between this condition and the accepted employment factors, she has failed to meet her burden of proof and the Office properly denied her claim for an emotional condition.

The April 13, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
February 21, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member